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Elizabeth E. Long
Fulton County Superior Judge

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**IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA**

**BSL HOLDINGS, LLC, and BSL
HOLDINGS, LLC Derivatively on Behalf
of Trinity Lifestyles Management, LLC
and Trinity Lifestyles Management II,
LLC,**

Plaintiffs,

v.

**TRINITY LIFESTYLES
MANAGEMENT, LLC; et al.,**

Defendants.

v.

R. BRADLEY BRYANT,

Third-Party Defendant

Civil Action File No. 2016CV278256

ORDER ON THIRD PARTY DEFENDANTS' MOTIONS TO DISMISS

Before this Court are two Motions to Dismiss Third Party Complaints. Some Defendants in the underlying case¹ filed two separate Third Party Complaints against R. Bradley Bryant ("Bryant") on October 31, 2016, *nunc pro tunc*. Two separate Amended Third Party Complaints were filed on December 21, 2016. The third party claims raised by Solomon III include an indemnity claim (Count 1), a conversion claim (Count 2), breach of fiduciary duty (Count 3), punitive damages (Count 4), and attorneys' fees (Count 5). The third party claims raised by Holbrook, SSL, SH, Solomon II, Solomon IV, and Solomon V (collectively, "Holbrook/Solomon

¹ The Court relies on abbreviations of party names in the contemporaneously filed Order addressing the Motions to Dismiss filed by Defendants.

Parties”) include an indemnity claim brought by all these Third Party Plaintiffs (Count 1), breach of fiduciary duty claims brought separately by each Third Party Plaintiff (Counts 2-7), punitive damages (Count 8), and attorneys’ fees (Count 9).

Indemnity Claims

O.C.G.A. § 9-11-14 allow a defendant to an action to file a third party complaint against a non-party “who is or may be liable to him for all or part of the plaintiff’s claim against him.” “A defendant cannot assert an entirely separate claim against the third-party even though it arises out of the same general set of facts as the main claim.” *Bowden v. Russell*, 200 Ga. App. 239, 240 (1991) (finding trial court erred in denying motion to dismiss third party complaint). “There must be an attempt to pass on to the third-party all or part of the liability asserted against the defendant (but not to tender the third-party as a substitute defendant).” *Id.* (quoting *Knapp v. Lolley*, 177 Ga. App. 786, 787-788 (1986)).

In the Complaint in this case, BSL asserts it is entitled to a \$200,000 distribution from Solomon III that it did not receive. In its separate Third Party Complaint, Solomon III denies it owes BSL \$200,000 but argues that if it does, it is entitled to recover \$200,000 from Bryant. Solomon III argues Bryant, as CFO of Trinity I and Trinity II from 2005 to early 2013, made a \$200,000 unapproved distribution in 2007 from Solomon III to himself. The Motion to Dismiss the Solomon III’s indemnity claim is **DENIED**.

The Holbrook/Solomon parties also assert a claim for indemnification. Unlike Solomon III, however, they do not make their recovery for the indemnity claim contingent upon any finding in the underlying lawsuit or specify how Bryant is liable for part or all of any part of BSL or Trinity’s claims against it. Thus, there is no stated basis for the indemnity claim and the Motion to Dismiss Holbrook/Solomon’s indemnity claim is **GRANTED**.

Independent Claims Raised in the Third Party Complaints

In addition to indemnity, all Third Party Plaintiffs assert breach of fiduciary claims and Solomon III alleges a conversion claim against Bryant. “That a third-party claimant can join independent claims is ‘a general rule.’” *Shleifer v. Bridgestone-Firestone, Inc.*, 223 Ga. App. 256, 256 (1996); see also *Cohen v. McLaughlin*, 250 Ga. 661 (1983)(when impleader under O.C.G.A. § 9-1-14 is proper, § 9-11-18 permits joinder of direct claims). “A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.” O.C.G.A. § 9-11-18(a). Thus, the general rule is that a third party plaintiff may piggy-back on its indemnity claim to bring direct claims. Because Solomon III’s indemnity claim properly brings Bryant into the action as a third party defendant, Solomon III is “a party asserting a claim to relief as a ... third party claim” and Solomon III may join claims against Bryant, an “opposing party.”

The question is whether, once in the case, other defendants may piggyback on an indemnity claim asserted by another party and bring direct claims against a third party defendant. The Holbrook/Solomon Parties rely on Solomon III’s indemnity claim as the anchor claim. Under O.C.G.A. § 9-11-18(a), only “a party asserting a claim” may join claims. Bryant is not an “opposing party” to the Holbrook/Solomon Parties except to the extent they are allowed to assert their direct claims as third party claims. While O.C.G.A. § 9-11-14(a) expressly allows certain claims between the parties to be filed once a third party is in the case, it does not specifically authorize related claims by a defendant who does not legitimately allege the third party defendant may be liable to him for part of the plaintiff’s claim against him. Because the Holbrook/Solomon Parties have not alleged secondary liability against Bryant, their direct claims

cannot be asserted in this action under Georgia law. The Motion to Dismiss all Holbrook/Solomon's third party claims is **GRANTED**.

As to Solomon III's conversion claim, Bryant argues the claim fails because it is barred by the four year statute of limitations since the conversion occurred December 10, 2007 and the Third Party Complaint was not filed until 2016. See O.C.G.A. § 9-3-32. Solomon III argues the statute of limitations was tolled by Bryant's alleged fraud which concealed the existence of the cause of action until it was discovered in August of 2013 after Bryant was removed from his position as CFO of Trinity. See O.C.G.A. § 9-3-96 (tolling limitations period until discovery of fraud which debarred or deterred plaintiff from bringing action). The allegations of Solomon III's Third Party Complaint allege Bryant kept the transfer a secret and failed to properly and transparently record and book the transfer which effectively concealed the unauthorized distribution. Whether facts will demonstrate that this concealment was an intentional act and "actual fraud involving moral turpitude" which deterred Solomon III from filing suit earlier cannot be decided at this stage in the litigation. See *Hunter, Maclean, Exley & Dunn, P.C. v. Frame*, 269 Ga. 844, 846-47 (1998). The Motion to Dismiss Solomon III's conversion claim is **DENIED**.

As to Solomon III's breach of fiduciary duty claim, Bryant argues the claim fails because it sounds in professional negligence and Solomon III did not comply with the affidavit requirement found in O.C.G.A. § 9-11-9.1. Under O.C.G.A. §9-11-9.1, a plaintiff must file an affidavit of an expert competent to testify in any action for damages alleging professional malpractice against a Certified Public Accountant. See O.C.G.A. §9-11-9.1(a),(g). The affidavit must be filed contemporaneously with the Complaint and must "set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim." *Id.*

“Not every claim which calls into question the conduct of one who happens to be a lawyer is a professional malpractice claim requiring expert testimony or an O.C.G.A. § 9-11-9.1 affidavit.” *CenTrust Mortg. Corp. v. Smith & Jenkins, P.C.*, 220 Ga. App. 394, 395–96, (1996) (citations omitted). “However, expert testimony and an affidavit will be required for those claims “for professional malpractice by negligent act or omission, sounding in tort or by breach of contract for failure to perform professional services in accordance with the professional obligation of care.” *Id.* at 396 (citations omitted). “[T]he key question is did the task in question require the exercise of professional judgment and skill.” *Id.* (citations omitted) (finding negligence claims against attorney for deficient title search work performed by a non-attorney under his supervision was a professional malpractice claim requiring an affidavit.); see also *Hilton v. Callaghan*, 216 Ga. App. 145 (1995) (requiring affidavit for breach of contract claim against accountant who failed to provide his client with necessary and proper tax advice). The statute only applies to “claims of professional negligence, as opposed to ordinary negligence or intentional torts.” *Crosby v. Pittman*, 305 Ga. App. 639, 639 (2010) (not requiring affidavit for breach of fiduciary claim against attorney who told client traffic fine was \$350, collected the money from his client, but never paid the fine which was actually only \$300). Here, Bryant is a CPA and was acting as an accountant on behalf of Solomon III. The misconduct alleged is professional in nature: failing to maintain books and records properly, comingling funds among entities, and making unauthorized distributions. The Motion to Dismiss Solomon III’s breach of fiduciary duty claim is **GRANTED**.

SO ORDERED this 20th day of January, 2017.


ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division

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